STATE OF MICHIGAN

COURT OF APPEALS

SANDRA THOMPSON,

Plaintiff-Appellant,

v

KRAMER-TRIAD MANAGEMENT GROUP LLC, and SIERRA POINTE CONDOMINIUM ASSOCIATION,

Defendants,

and

GT LANDSCAPING, INC.,

Defendant-Appellee.

UNPUBLISHED
March 15, 2011

No. 295190
Oakland Circuit Court
LC No. 2008-093653-NO

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in GT Landscaping, Inc.'s ("GT") favor. Because the trial court failed to consider the substance of plaintiff's motion for reconsideration, we reverse and remand to the trial court, directing it to view plaintiff's motion for reconsideration as though it were filed as a motion to amend under MCR 2.118, allow for a response to said motion on the part of GT, and determine whether leave to amend should, in fact, be granted. We affirm in all other respects.

In January 2007, plaintiff worked as a home health care aide, providing overnight assistance to a gentleman who lived in the Sierra Pointe Condominium complex. When plaintiff arrived at the gentleman's home around 10:00 p.m. on January 27, 2007, plaintiff noted that it was sleeting and that conditions were icy. Plaintiff completed her shift at 5:00 a.m. on January 28, 2007 and left the condominium through the front door. As plaintiff stepped onto the second step leading from the porch to the sidewalk, she slipped and fell, incurring injuries. According to plaintiff, while the porch and first step were salted, the second step was not, and ice on the step caused her to fall.

Plaintiff thereafter initiated the instant lawsuit against the condominium association, the company that managed the condominium complex, and GT, the contractor who provided snow removal services for the condominium complex. In her complaint, plaintiff asserted that all defendants were negligent and that such negligence caused her injuries. With respect to GT specifically, plaintiff asserted that GT, by way of a contract with the other two defendants, owed plaintiff a duty to perform its duties with care, and that it breached this duty by, among other things, failing to ensure that all steps had sufficient ice melting substances. GT moved for summary disposition, contending that pursuant to *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), a plaintiff has no cause of action against a snow removal contractor for negligence when the allegation is that the contractor failed to perform a contractual duty. GT alternatively contended that it had no contractual duty to salt the steps and thus could not be liable for breaching a duty to plaintiff based upon its failure to apply salt to the steps. The trial court granted GT's motion, opining that under *Fultz*, the snow removal contract between GT and defendants did not create a duty owed by GT to plaintiff. The trial court also opined that, to the extent that plaintiff sought to hold GT liable for breach of a common law duty, she did not move to amend her complaint to present this claim. The trial court later denied plaintiff's motion for reconsideration. Plaintiff now appeals.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Whether a defendant owes a duty toward a plaintiff is a question of law that is reviewed de novo. *Ghaffari v Turner Const Co*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

On appeal, plaintiff first asserts that her claim against GT was not barred by *Fultz v Union-Commerce Associates*, 470 Mich 460, because *Fultz* did not abrogate the common law duty to perform a contract with care, and because GT created a new hazard. We disagree.

To establish a claim of negligence a party must prove four elements: duty, breach of that duty, causation and damages. *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). In any negligence action, the initial question to be addressed is whether the plaintiff was owed a duty by the defendant. In negligence actions brought against a contractor on the basis of a contract between a premises owner and that contractor, such as the one at bar, the threshold question is "whether the contractor breached a duty separate and distinct from those assumed under the contract." *Fultz*, 470 Mich at 461-462.

In *Fultz*, the plaintiff fell in an icy parking lot and brought suit against the owner of the parking lot, and the contractor whom the owner had hired to remove the snow and ice from the parking lot. The plaintiff contended that by contracting to plow and salt the parking lot, the contractor owed a common law duty to exercise reasonable care in performing its contractual duties and that its failure to plow and salt breached that duty. The *Fultz* Court directed that a tort action based upon a contract, and brought by a plaintiff who is not a party to that contract, should

be analyzed to determine whether the defendant "owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467. Using its directed analysis, *Fultz* determined that while the plaintiff relied upon common law tort principles, she was really claiming only that the contractor breached its contract with the parking lot owner. The Court ultimately determined that the contractor "owed no contractual or common law duty to plaintiff to plow or salt the parking lot." *Id*. at 463.

In the instant matter, plaintiff's complaint alleged that GT owed a duty to her by virtue of the snow removal contract. Specifically, plaintiff alleged in her complaint that "Defendant GT by way of a contract with Defendants Kramer and Sierra, owed a duty to plaintiff and others by performing its duties with ordinary care, in a non-negligent manner and to not worsen any conditions to increase the risk of injury." Plaintiff further asserted that defendant negligently performed its obligations by, among other things, negligently maintaining an icy condition on the second step off the porch, failing to adequately salt the step, and inadequately salting the steps. Because plaintiff premised her claim entirely on the contractual obligations owed by GT, her claim, as it is presently worded, falls squarely within *Fultz's* application. The trial court thus did not err in applying *Fultz* to plaintiff's action as pleaded.

Plaintiff next asserts that GT created a "new hazard," such that *Fultz* is inapplicable. We disagree.

In *Fultz*, our Supreme Court indicated that a circumstance where a contractor breaches a duty that is separate and distinct from the contract would occur if the contractor "creates a 'new hazard' that it should have anticipated would pose a dangerous condition to third persons." *Id.* at 468-469. Here, plaintiff contends that because the porch and first step were salted, she had no worry that the remaining steps would be unsalted. According to plaintiff, the salting of the top step provided her with a false sense of security as to the condition of the remaining steps, and this false sense of security amounted to the creation of a new hazard by GT. However, plaintiff has provided no authority suggesting that her subjective state of mind could fall within the label of a 'new hazard.'

Moreover, plaintiff's situation is distinctly different from those cases finding that the creation of a new hazard triggered a duty independent of the contractual obligation. Looking at relevant published authority as well as the unpublished, unbinding cases cited by plaintiff, it can be concluded that a 'new hazard' occurs when some affirmative act on the part of the defendant caused a physical condition to be brought into existence.

In *Boylan v Fifty-Eight Limited Liability Co*, ___Mich App ___; ___ NW2d ___ (2010), flooding and sewage backup damaged a residence owned by defendant. An investigation revealed that the township in which the residence was located had contracted with a construction company for the installation of a water main and that during the construction of the water main, the construction company had eliminated a swale that had previously protected the home from surface water runoff. Presented with the question of whether the construction company owed the defendant any duty separate and distinct from its contract with the township, the Court turned to *Fultz* for guidance. This Court observed that in reaching its conclusion, the Supreme Court in *Fultz* had rejected the notion that a common law duty to the plaintiff arose solely from the

contractor's breach of its contract with the parking lot owner. *Slip Opinion* at 3. Instead, according to *Boylan*, the *Fultz* decision contemplates that despite the existence of a contract, "under certain circumstances, tort duties to third parties may lie." *Id*. *Boylan* noted the specific circumstance mentioned in *Fultz*-- the contractor creates a new hazard-- and opined that in the case before it, the construction company did, in fact, create a new hazard by interfering with the subject property's drainage system. According to *Boylan*, the drainage system was not a subject of the construction company's contract such that allegations concerning the drainage did not involve a breach of the construction company's duties under the contract, but instead involved duties separate and distinct from the contract. *Boylan* also indicated that the construction company's entry onto the defendant's property triggered separate and distinct common law duties to avoid permanently damaging the property.

In *Gross v Thomas Sebold & Associates, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 276617), cited by plaintiff, a bicyclist was injured when she attempted to enter her bike onto a newly constructed sidewalk whose grading had not yet been completed. In addressing plaintiff's claim that two of the defendants involved in the construction of the sidewalk created a 'new hazard' as contemplated in *Fultz*, the *Gross* panel noted the distinction between the factual scenario before it and that in *Fultz*:

> Here, unlike in *Fultz*, defendants [] took affirmative action in designing and installing the sidewalk on which [the plaintiff] was riding her bicycle. . . The sidewalk was installed and the forms were removed, resulting in a drop of approximately six to eight inches from the sidewalk to the adjacent ground. The resulting drop was apparently not corrected until after [the plaintiff's] bicycle accident. Thus, by their conduct, these defendants created a new hazard, at least until the grading around the sidewalk was completed. Therefore, *Fultz* does not preclude recovery against [the defendants].

Similarly, in *Katzman v Orion Const Co*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2006 (Docket No. 268006), (also cited by plaintiff) a panel of this Court found that a snow removal contractor created a new hazard when it left a extraordinarily large piece of rock salt, concealed by snow, in a parking lot.

The above cases support an interpretation of the phrase "create a new hazard" to mean that a defendant undertakes some affirmative action that creates a hazard which did not, before it undertook the action, previously exist. This interpretation is also consistent with the definition of "create" set forth in *The American Heritage Dictionary of the English Language* (2006): "to bring into being."

At its most elemental level, what plaintiff asserts in the instant action is that GT *failed* to do something–salt the second step—or that it did a bad or incomplete job of salting. The hazard posed by the icy step existed prior to GT's appearance. GT did not create the hazard, but instead failed to remedy it. GT thus created no new hazard.

Notably, it was revealed through discovery in this matter that GT did not contract to salt the porch steps at the condominium complex. The parties now agree that GT was not contractually obligated to salt the steps. That being the case, plaintiff additionally asserts that

Fultz is inapplicable to the instant matter, because while GT had no contractual duty to salt the steps, it voluntarily undertook such action. And, when one assumes a duty, he or she is required to carry it out with due care.

Plaintiff is correct that if one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995). However, as indicated by the trial court, plaintiff did not allege any voluntary action on GT's part in her complaint that would trigger a common law duty. On the record before it, then, the trial court did not err in granting summary disposition in GT's favor.

Finally, plaintiff contends that the trial court should have allowed her to amend her complaint to allege that GT breached a common law duty owed to plaintiff. We agree that plaintiff should be given the opportunity to have her motion decided on its merits.

MCR 2.116(I)(5) provides that if the grounds asserted in a motion for summary disposition are based on subrule (C)(8), (9), or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.118(2) provides:

> Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

In the instant matter, the trial court granted summary disposition in GT's favor on October 13, 2009. Plaintiff filed a "Motion for Reconsideration" on October 21, 2009. In the motion, plaintiff stated:

> Plaintiff moves this court to reconsider the portion of its opinion and order dated October 13, 2009 where the court held that plaintiff had not filed a motion to amend its complaint to conform to the evidence, alleging GT's common law duty to use reasonable care when salting the steps. Plaintiff seeks leave from the court to file a first amended complaint to allege these non-contractual common law duties and breaches by Defendant GT. In order to do so, the order dismissing plaintiff's case against GT must be reconsidered.

Plaintiff then cited to the court rules governing the amendment of pleadings, and requested that the trial court grant plaintiff leave to amend her complaint. Attached to the motion was a proposed first amended complaint.

In denying plaintiff's motion, the trial court opined that plaintiff had not moved to amend her pleadings under MCR 2.118 and that plaintiff thus did not demonstrate an error on the court's part. While technically correct, the trial court's determination unduly exalts form over substance.

"When ascertaining the exact nature of a plaintiff's claim, we are not bound by the plaintiff's choice of labels because this would exalt form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). We look beyond mere procedural labels and

look at a pleading as whole to determine the nature of a claim. The particular type of relief sought is a relevant consideration in determining the essential nature of a plaintiff's claim. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

Examining plaintiff's motion titled "motion for reconsideration" as a whole, it is abundantly clear that plaintiff sought leave to amend her complaint. Given that summary disposition was granted based upon MCR 2.116(C)(10), "the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). The trial court did not address whether an amendment would be futile or provide any other particularized reason why amendment would not be justified. Instead, it essentially refused to hear the motion because it was not in the proper form. We see no valid reason for failing to view the motion based on its contents and the trial court has provided none.

Affirmed, in part, and reversed, in part, and remanded to the trial court. On remand, the trial court is directed to view plaintiff's motion for reconsideration as though it were filed as a motion to amend under MCR 2.118, allow for a response to said motion on the part of GT, and determine whether leave to amend should, in fact, be granted. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto